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DATO' SERI ANWAR IBRAHIM

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: W-09-245-2010]

C

14 JANUARY 2011

CRIMINAL PROCEDURE: *Appeal - Right of - Order of High Court on application to recuse judge during trial - Whether such order appealable - Whether order finally disposing of rights of parties - Interlocutory order - Not a decision within ambit of ss. 3 & 50(1) of Courts of Judicature Act 1964 - Court has no jurisdiction to hear appeal*

D

The accused was facing a charge of intentionally committing carnal intercourse against the order of nature, an offence punishable under s. 377B of the Penal Code. The trial at the High Court had commenced. The accused had during the course of the trial filed an application to recuse the learned trial judge on the grounds that the trial judge had intimidated the accused's learned counsel with contempt proceedings. The trial judge dismissed the recusal application. The accused filed this appeal against the said decision. The learned Deputy Public Prosecutor raised a preliminary objection on the ground that the ruling of the trial judge was not within the purview of 'decision' in s. 3 read with s. 50(1) of the Courts of Judicature Act 1964 ('the Act'), as it was made in the course of a trial and did not finally dispose of the accused's rights under the charge.

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Held (dismissing the appeal)
Per Low Hop Bing JCA:

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(1) The intention as manifested in s. 3 of the Act, read with s. 50(1)(a) of the Act and the Explanatory Statement, is clear and unambiguous *ie*, to bar the filing of an appeal against a ruling made by a trial court and also to help expedite the hearing of cases in trial courts. The intention of Parliament in enacting s. 3 and s. 50(1)(a) was to exclude interlocutory appeals in criminal causes or matters. (para 16)

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(2) As the definition of 'decision' in s. 3 of the Act is clear and unambiguous, it is the duty of the court to give effect to it. The court has no powers beyond those conferred by Parliament. Accordingly, there is no jurisdiction to hear an interlocutory appeal *ie*, interim appeal against a ruling which does not constitute a final resolution of the whole controversy or an appeal that occurs before the trial court's final ruling on the entire case. (para 17)

(3) The ruling of the learned trial judge in dismissing the accused's recusal application was made in the course of the trial which did not finally dispose of the rights of the accused and was therefore not a decision within the ambit of s. 3 read with s. 50(1)(a) of the Act. It was only the outcome of the trial that would have the effect of finally disposing of his rights. (para 19)

Per Abdul Malik Ishak JCA (concurring):

(1) The ruling by the learned trial judge was interlocutory in nature and made in the course of the trial and it was not final. Since the ruling of the trial judge was not appealable, the court had no jurisdiction to hear the appeal. Hence the appeal should be dimsissed for want of jurisdiction. (para 56)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh menghadapi pertuduhan dengan sengaja melakukan persetubuhan di luar tabii, satu kesalahan di bawah s. 377B Kanun Keseksaan, di mana perbicaraan telah pun bermula di Mahkamah Tinggi. Semasa perbicaraan, tertuduh telah memfail permohonan supaya yang arif hakim bicara menarik diri dari mendengar kes atas alasan bahawa hakim bicara telah mengugut peguam bijaksana tertuduh dengan prosiding menghina mahkamah. Permohonan bagaimanapun ditolak oleh hakim bicara dan tertuduh merayu. Di hadapan yang arif hakim-hakim rayuan, Timbalan Pendakwa Raya yang bijaksana telah membangkitkan bantahan awal atas alasan bahawa dapatan hakim bicara bukan suatu "keputusan" dalam maksud s. 3 di baca bersama s. 50(1) Akta Mahkamah Kehakiman 1964 ('Akta'), kerana dibuat dalam perjalanan suatu perbicaraan dan tidak secara muktamad melupuskan hak-hak tertuduh di bawah pertuduhan.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR:

(1) Niat seperti yang terserlah dari s. 3 Akta di baca bersama s. 50(1)(a) Akta serta kenyataan penerangan di situ adalah jelas dan tidak kabur, iaitu bagi menghalang rayuan terhadap sebarang dapatan yang dibuat oleh mahkamah bicara dan bagi membantu mempercepatkan pendengaran kes di mahkamah-mahkamah bicara. Niat Parlimen dalam menggubal s. 3 dan 50(1)(a) adalah bagi menyisihkan rayuan interlokutori dalam kausa-kausa atau halperkara-halperkara jenayah.

(2) Oleh kerana takrif "keputusan" di dalam s. 3 Akta jelas dan tidak kabur, maka menjadi tanggungjawab mahkamah untuk memberi kesan kepadanya. Mahkamah tidak ada kuasa selain dari apa yang diberikan oleh Parlimen. Berikutan itu, tidak wujud bidangkuasa untuk mendengar rayuan interlokutori, iaitu rayuan interim terhadap dapatan yang bukan merupakan satu keputusan muktamad terhadap keseluruhan kontroversi atau rayuan yang berbangkit sebelum dapatan muktamad dibuat oleh mahkamah terhadap keseluruhan kes.

(3) Dapatan yang arif hakim bicara dalam menolak permohonan tertuduh supaya hakim menarik diri dibuat dalam perjalanan perbicaraan dan tidak melupuskan secara muktamad hak-hak tertuduh dan oleh itu bukanlah suatu keputusan seperti yang dimaksudkan s. 3 dibaca bersama s. 50(1)(a) Akta. Hanya keputusan perbicaraan tersebut yang akan memberi kesan melupuskan hak-hak tertuduh secara muktamad.

Oleh Abdul Malik Ishak HMR (menyetujui):

(1) Dapatan yang arif hakim adalah bersifat interlokutori dan dibuat dalam perjalanan perbicaraan dan ia tidaklah muktamad. Oleh kerana dapatan yang arif hakim tidak boleh dirayui, mahkamah tiada bidangkuasa untuk mendengar rayuan. Maka rayuan harus ditolak atas alasan ketiadaan bidangkuasa.

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***
Emperor v. Khwaja Nazir Ahmad [1945] AIR PC 18 ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others [1998] 1 WLR 896 ***(refd)***
PP v. Foong Chee Cheong [1969] 1 LNS 128 HC ***(refd)***
PP v. Letchumanan Suppiah [2009] 5 CLJ 652 FC ***(refd)***

PP v. Su Liang Yu [1976] 2 MLJ 128 ***(refd)***
R v. Clowes and another (No 2) [1994] 2 All ER 316 ***(refd)***
Regina v. Collins [1970] 1 QB 710 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
TFW Printers Ltd v. Interserve Project Services Ltd [2006] 109 Con LR 1 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(1)(a), 62(2)
Criminal Procedure Code, ss. 107, 112, 178, 179, 180, 181, 182, 182A, 183
Federal Constitution, arts. 8(1), 121(1B)
Penal Code, s. 377B

Constitution of India [Ind], art. 14

Other source(s) referred to:
Black's Law Dictionary, 8th edn, pp 106, 832

For the appellant - Karpal Singh (Dato' Param Cumaraswamy, SN Nair & Ramkarpal Singh with him); M/s SN Nair & Partner
For the respondent - Mohamad Hanafiah (Dato' Nordin Hassan, Wong Chiang Kiat, Noorin Badaruddin, Naidatul Athirah Azman & Mira Mirna Musa with him); AG's Chambers

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-9-2009 & Criminal Application Nos: 44-258-2010]

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal lodged by the appellant ("the accused") is directed against the decision of the Kuala Lumpur High Court, given on 6 December 2010, dismissing the accused's application to recuse the learned trial judge from continuing to handle the criminal proceedings against the accused in Criminal Trial No. MTJ3-45-9-2005 ("the second recusal application").

[2] On 14 January 2010, we dismissed the accused's appeal *in limine.*

[3] We now provide our full judgment.

A **Factual Background**

[4] In the Kuala Lumpur High Court, the accused was facing a charge of intentionally committing carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan ("the
B complainant") by inserting his (the accused's) penis into the complainant's anus, punishable under s. 377B of the Penal Code.

[5] The trial commenced on 3 February 2010 with the calling of the complainant as PW1.

C **[6]** After the learned trial judge had dismissed the accused's two applications *viz* (1) to cite Utusan Malaysia for contempt of court; and (2) to issue a warning to Utusan Malaysia concerning reports of the trial published in the said paper on 4 and 5 February 2010 respectively, on 8 February 2010, the accused filed the first
D application to recuse the learned trial judge.

[7] Currently, the prosecution was at the stage where PW3 was under cross-examination by the accused's learned counsel. At that juncture, the accused made the second recusal application averring
E in para 5 of his affidavit in support that in the course of the trial, the learned trial judge had intimidated the accused's learned counsel with contempt proceedings.

[8] The learned trial judge considered and ruled that the second
F recusal application stood dismissed. Hence, the accused's appeal before us.

Preliminary Objection

[9] Learned deputy public prosecutor Mr Mohamad Hanafiah
G (assisted by Dato' Nordin Hassan, Mr Wong Chiang Kiat, Ms Noorin Badaruddin, Ms Naidatul Athirah Azman and Ms Mira Mirna Musa) raised a preliminary objection, on the ground that the ruling of the learned trial judge is clearly not within the purview of 'decision' in s. 3 read with s. 50(1) of the Courts of
H Judicature Act 1964, as it was made in the course of a trial and did not finally dispose of the accused's rights under the charge. (Unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Courts of Judicature Act 1964 unless otherwise stated.

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[10] Learned defence counsel Mr Karpal Singh (Dato' Param Cumaraswamy, Mr S N Nair and Mr Ramkarpal Singh with him) contended in essence that the order of the learned trial judge is final and appealable.

[11] In our view, the questions raised for our determination revolve around the jurisdiction of this court to hear the appeal, and the accused's right to appeal.

[12] This court is a creature of statute. It was established in 1994 *vide* art. 121(1B) of the Federal Constitution. As we are considering a cause or matter arising from the High Court in the instant appeal, the specific law governing the jurisdiction of this court is to be found in art. 121(1B). It provides for jurisdiction of this court in the following words:

> **121. Judicial power of the Federation**
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> ...
>
> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.
>
> [Am. Act A1269]

[13] Under art. 121(1B), the jurisdiction of this court is to hear and determine appeals from decisions of a High Court or a judge thereof. In addition, this court has such other jurisdiction as may be conferred by or under federal law. With specific reference to the appeal under consideration ie, an appeal arising from a criminal cause or matter in the High Court exercising its original jurisdiction, that federal law is to be found in s. 50(1)(a) which reads:

A **50. Jurisdiction to hear and determine criminal appeals**

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any **decision** made by the High Court (a) in the exercise of its
B original jurisdiction. (emphasis added)

[14] The word 'decision' in s. 50(1)(a) is defined in s. 3 as meaning any "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause
C or matter which does not finally dispose of the rights of the parties".

[15] The above meaning assigned to the word 'decision' is crystallized in the Explanatory Statement which reads:

D At the moment in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This causes a long delay in the completion of
E the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[16] The intention as manifested in s. 3, read with s. 50(1)(a) and the Explanatory Statement, is clear and unambiguous ie, to
F bar the filing of an appeal against a ruling made by a trial court and also to help expedite the hearing of cases in trial courts. In other words, while the law allows appeals against a judgment, sentence or order, it expressly excludes all appeals against all rulings made in the course of a trial or hearing of any cause or
G matter which does not finally dispose of the rights of the parties. Put simply, the intention of Parliament in enacting s. 3 and s. 50(1)(a) is to exclude interlocutory appeals in criminal causes or matters.

H **[17]** As the definition of 'decision' in s. 3 is clear and unambiguous, it is the duty of the court to give effect to it. This court has no powers beyond those conferred by Parliament. Accordingly, there is no jurisdiction to hear an interlocutory appeal ie, interim appeal against a ruling which does not constitute a final
I resolution of the whole controversy, or "an appeal that occurs before the trial court's final ruling on the entire case." (see *Black's*

Law Dictionary, 8th edn, and *Regina v. Collins, supra*). Justice demands that cases should move without unnecessary interruption to their final conclusion. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the substantive appeal, if any, which may be filed after the trial process is brought to its conclusion.

[18] Illustrations of non-appealable interlocutory appeals against rulings which did not have the effect of finally disposing of the parties' rights include:

(1) A decision made pending the trial of the charge(s) against the appellant, such as a decision on bail (by the court of first instance) where the grant or refusal of it will not finally determine the rights of the appellant in the outcome of his trial: *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [1999] 1 CLJ 537 CA;

(2) Ordering the accused to enter on this defence: *Saad Abas & Anor v. Public Prosecutor* [1998] 4 CLJ 575 CA;

(3) Refusing to order the Director of Public Prosecutions to deliver further and better particulars of a count in an indictment: *Regina v. Collins* [1970] 1 QB 710 CA; and

(4) Refusing to allow the defence to inspect the complainant's s. 112 (of the Criminal Procedure Code) statement: *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* (Court of Appeal Criminal Appeal No. W-05-178-2010 – Unreported dated 25 June 2010).

[19] In the instant appeal, the ruling of the learned trial judge in dismissing the accused's second recusal application was made in the course of the trial which does not finally dispose of the rights of the accused and is therefore not a decision within the ambit of s. 3 read with s. 50(1)(a). It is only the outcome of the trial that would have the effect of finally disposing of his rights.

[20] The underlying reason behind the amendment to the definition of 'decision' in s. 3, introduced by Amendment Act A1031 of 1998 with effect from 31 July 1998, is to stop parties from filing appeal after appeal on rulings made by the trial court in the course of a trial, thereby stifling a trial before the trial court: See *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625 FC.

A

Conclusion

[21] On the foregoing grounds, we unanimously sustained the preliminary objection and dismissed this appeal *in limine*.

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[22] My learned brothers Abdul Malik Ishak and Ahmad Maarop JJCA have read this judgment in draft and agreed with it as the judgment of the court. In addition, my learned brother Abdul Malik Ishak JCA has written another judgment in support of mine.

Abdul Malik Ishak JCA:

C

Introduction

[23] I have obtained the permission of the Honourable President of the Court of Appeal to write this separate judgment pursuant to the proviso to s. 62(2) of the Courts of Judicature Act 1964 ("CJA") as I felt that interesting points of law have been raised by the parties herein. This is my separate judgment to the judgment written by my learned brother Justice Low Hop Bing, JCA.

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[24] Now, by way of a notice of motion dated 24 November 2010, the appellant applied to recuse Justice Mohamad Zabidin bin Mohd Diah ("the learned trial judge") from hearing the criminal trial of the appellant. The recusal application was supported by an affidavit of the appellant affirmed on 24 November 2010.

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[25] The crux of the appellant's application hinged on the contentions that the learned trial judge had intimidated the learned counsel for the appellant with contempt proceedings in the course of the trial even though the learned trial judge had withdrawn the alleged intimidation and that there was a real danger of bias if the learned trial judge were to continue hearing the case.

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[26] The appellant is currently facing a charge under s. 377B of the Penal Code and the trial before the learned trial judge is proceeding at a slow pace. For an offence under s. 377B of the Penal Code, the appellant is said to "intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan" by inserting his penis into Saiful's anus.

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[27] On 6 December 2010, the learned trial judge after hearing the submissions of the parties refused to recuse himself and upon the application of the appellant's counsel with no objection by the prosecution, granted a stay pending appeal to this court.

[28] Aggrieved by the ruling of the learned trial judge, the appellant lodged at an appeal to this court.

The Preliminary Issue And The Analysis Thereto

[29] The prosecution raised a preliminary objection fashioned in this way. Whether the ruling of the learned trial judge in refusing to recuse himself from hearing the criminal trial of the appellant is appealable? I would answer this question in the negative. It is not a "decision" within the meaning of s. 3 of the CJA. I will now elaborate.

[30] It is argued on behalf of the appellant that the refusal by the learned trial judge to recuse himself is a final order because if the learned trial judge had recused himself that would have been the end of the matter. But, it is clear that the learned trial judge did not recuse himself and there is thus no necessity for a new judge to replace him.

[31] As presently worded, s. 3 of the CJA seeks to exclude from the term "decision" any ruling made in the course of a trial or hearing which does not finally dispose of the rights of the parties. In refusing to recuse himself, the learned trial judge was merely making a ruling that will not dispose of the rights of the parties, once and for all. The trial will have to proceed to its final conclusion by the learned trial judge.

[32] It makes not a whit of a difference that no objection was taken by the prosecution when the appellant sought for a stay of the proceedings pending appeal to this court. It must be borne in mind, that a criminal trial involves the roles of the prosecution as well as the defence. In the words of Lamin PCA in *Saad Abas & Anor v. PP* [1998] 4 CLJ 575, CA, at p. 582:

> A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. The moment the prosecution has proved its case meaning that the

court has decided that there is a case for the accused to answer, the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right or wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand, if he is acquitted at the end of the case for the prosecution, that means that the court has decided the fate of the accused and that as far as that court is concerned, the accused is a free man. Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the sessions court judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court judge has done. Only after he has heard the defence can he finally decide the fate of the accused.

[33] It was submitted that *Saad bin Abas (supra)* was wrongly decided. I beg to disagree. *Saad bin Abas (supra)* is still good law and it is referred and applied by the Federal Court in *PP v. Letchumanan Suppiah* [2009] 5 CLJ 652, FC. In a criminal trial, the procedure is rather simple. At the end of the prosecution's case, if the trial court finds that there is a *prima facie* case against the accused, the trial court has to call upon the accused to enter his defence. The accused is under an obligation to make his defence. The accused can either elect to remain silent or give his evidence in the dock or give his evidence on oath. After considering the defence, the trial court is entitled to convict the accused provided the prosecution has proved its case beyond reasonable doubt. It is at this point of time that the decision of the trial court is final and appealable.

[34] But, if at the end of the prosecution's case, the trial court finds that there is no *prima facie* case the trial court has to acquit and discharge the accused. The prosecution has the right to lodge an appeal because the ruling of the court is final and is appealable. After hearing the appeal, if the appellate court finds that there is a *prima facie* case, the defence of the accused has to be called. The accused is then obliged to enter his defence before the trial court. At the end of the defence case, the trial court is entitled to convict the accused provided the prosecution has proved its case beyond reasonable doubt.

[35] There is a complaint that at the end of the prosecution's case, if the trial court finds that there is no *prima facie* case the trial court has to acquit and discharge the accused and the prosecution is given the right to lodge an appeal. It is submitted that this conflicts with art. 8(1) of the Federal Constitution which states that:

> All persons are equal before the law and entitled to the equal protection of the law.

[36] It is further submitted that there is no level playing field for the appellant in the context of art. 8(1) of the Federal Constitution. It is also submitted that there should not be a discrimination between the appellant and the prosecution.

[37] The short answer is this. Trials before the High Court are set out in Chapter XX of the Criminal Procedure Code (Act 593) ("CPC"). It is applicable throughout the country and the procedures are statutorily laid out. Chapter XX of the CPC contains ss. 178, 179, 180, 181, 182, 182A and 183 and these sections are worded in this way and they are self-explanatory:

CHAPTER XX

TRIALS BEFORE THE HIGH COURT

Commencement of trial

178(1) When the Court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(2) If the accused pleads guilty the plea shall be recorded, and he may be convicted on it:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

(3) If the accused refuses to plead or does not plead, or if he claims to be tried, the Court shall proceed to try the case.

Opening case for prosecution

179(1) The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

(2) He shall then examine his witnesses, who may in turn be cross-examined for the defence and, if necessary, re-examined.

Procedure after conclusion of case for prosecution

180 (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

Defence

181 (1) When the accused is called upon to enter on his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses, if any, and after their cross-examination and re-examination, if any, may sum up his case:

Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided also that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(2) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if that witness is in attendance.

Reply

182. In all cases the officer conducting the prosecution shall have the right to reply on the whole case, whether the accused adduces evidence or not.

Procedure at the conclusion of the trial

182A(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

Sentence

183. If the accused is convicted, the Court shall pass sentence according to law.

[38] It applies to every accused person and the appellant is also bound by it and cannot be given special privilege. It is in this context that the appellant as an accused person is equal before the law and is entitled to the equal protection of the law. It is crystal clear that there is no breach of art. 8(1) of the Federal Constitution. All citizens in Malaysia are treated equally in the context of Chapter XX of the CPC (*Public Prosecutor v. Su Liang Yu* [1976] 1 LNS 113).

[39] The equality provision that is housed in art. 8(1) of the Federal Constitution had its antecedents in the English common law jurisprudence. Article 8(1) of the Federal Constitution owes its pedigree to art. 14 of the Indian Constitution and that, in turn, was inspired by the Fifth and Fourteenth Amendment of the United States Constitution. The word "law" that appears in art. 8(1) of the Federal Constitution must necessarily include procedural law and the procedural law in Chapter XX of the CPC is applicable to all accused persons and such a procedure is not arbitrary but fair. Procedural fairness includes the rules of natural justice and it is enshrined in Chapter XX of the CPC.

[40] Before a criminal case is filed in the trial court, the chronology of events would be as follows. A police report will be lodged by the complainant. An investigation will be undertaken by the police. The investigation file will be perused by the prosecution who will determine whether to prosecute or otherwise. If the

A prosecution decides to prosecute, the charge will be filed in the trial court. The process of the trial will be conducted to its finality when the "decision" is finally pronounced within the meaning of s. 50(1)(a) of the CJA read with s. 3 of the CJA by the trial court.

B

[41] I will now state briefly about the importance of a first information which must be tied up with the investigation which finally culminates in the trial before the trial court.

C **[42]** The first information report which is usually made very early after the occurrence of an offence is referred to as the police report. It sets investigation into motion which will finally lead to a charge being preferred against an accused person. Their Lordships of the Privy Council in *Emperor v. Khwaja Nazir Ahmad* [1945] AIR PC 18 held that the first information report is not a condition D precedent to the initiation of a criminal investigation. However, it must be borne in mind that s. 107 of the CPC states that every information relating to the commission of an offence, if given orally to an officer in charge of a police station, is to be reduced in writing by that officer or under his direction.

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[43] But, if no police report is made or if the first information report is not reduced to writing, this does not mean that the police has no power to act and the arrest made of the accused is void (see *Public Prosecutor v. Foong Chee Cheong* [1969] 1 LNS F 128).

[44] An investigation by the police encompasses recording statements from the witnesses under s. 112 of the CPC. Even the statement of the accused would be recorded under s. 112 of the G CPC. On receipt of the investigation file from the police, the prosecution will determine whether to charge the accused or otherwise. Once the accused is charged, the trial court will determine his fate until a "decision" is made in accordance with s. 50(1)(a) of the CJA read with s. 3 of the CJA.

H

[45] It is argued on behalf of the appellant that a ruling made in the course of the trial which finally disposes of the rights of the parties is appealable. It is submitted further that the ruling of the learned trial judge is not procedural. It is substantive. It is I emphasised that the present appeal is a re-hearing where this court has to place itself in the shoes of the learned trial judge.

[46] It is further argued by the appellant that the recusal application and the refusal to recuse by the learned trial judge is a final order. It is submitted, time and again, that if the learned trial judge were to recuse himself that would be a final order and that would be the end of the matter. And it is further submitted that just because the learned trial judge did not recuse himself, it cannot be said that it is not a final order.

[47] At this juncture, it is ideal to reproduce verbatim s. 50 of the CJA. It reads as follows (the relevant parts only):

> **Jurisdiction to hear and determine criminal appeals**
>
> 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

[48] And the term "decision" as employed in s. 50 of CJA is defined in s. 3 of the CJA in this manner:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;.

[49] As an aid to interpreting the term "decision" in s. 3 of the CJA, reference to the explanatory note should be referred to. It reads as follows:

2 Clause 2 seeks to amend section 3 of Act 91.

At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[50] It is always encouraged to refer to the explanatory note. Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others* [1998] 1 WLR 896, HL, referred to the explanatory note that accompanied the contract because of the deficiencies in the drafting of the contract. This was what his Lordship said at p. 913:

First, the claim form was obviously intended to be read by lawyers and the explanatory note by laymen. It is the terms of the claim form which govern the legal relationship between the parties. But in construing the form, I think that one should start with the assumption that a layman who read the explanatory note and did not venture into the claim form itself was being given an accurate account of the effect of the transaction.

[51] Even a brochure was held to be admissible in order to explain the investment scheme described in the contract (*R v. Clowes and another (No 2)* [1994] 2 All ER 316, CA).

[52] It is always thought that explanatory note ought to be admissible (*TFW Printers Ltd v. Interserve Project Services Ltd* [2006] 109 Con LR 1).

[53] Indeed, the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625 referred to the explanatory note in order to construe the definition of the term "decision" in s. 3 of the CJA.

[54] Way back in 1999, this court in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537, at p. 555, had occasion to construe the meaning of the term "decision" in s. 3 of the CJA in this way:

> A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

[55] In *Saad Abas (supra)*, Lamin PCA construed s. 50(2) of the CJA in this way (see p. 587):

> So, for the purpose of section 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

[56] The ruling by the learned trial judge is interlocutory in nature and made in the course of the trial and it is not final. And since the ruling of the learned trial judge is not appealable, this court has no jurisdiction to hear the appeal.

[57] *Black's Law Dictionary*, 8th edn, defines the word "interlocutory" at p. 832 as follows:

> (Of an order, judgment, appeal, etc) interim or temporary, not constituting a final resolution of the whole controversy.

[58] The present appeal can be described as an interlocutory appeal which does not dispose of the rights of the parties. *Black's Law Dictionary*, 8th edn, defines the words "interlocutory appeal" at p. 106 in this way:

> An appeal that occurs before the trial court's final ruling on the entire case.

[59] For want of jurisdiction, this appeal should be dismissed *in limine*.